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No. 81-2150

IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California corporation,

Petitioner,

vs.

FRANK L. TODD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOINT APPENDIX.

JAMES T. WINKLER,*
STEVEN D. ATKINSON,
ATKINSON, ANDELSON, LOYA,
RUUD & ROMO,
911 Studebaker Road,
Suite 250,
Long Beach, Calif. 90815,
(213) 493-3571,
Counsel for Petitioner.
**Counsel of Record.*

WAYNE JETT,*
CHRISTOPHER M. LAQUER,
JETT, CLIFFORD & LAQUER,
3055 Wilshire Boulevard,
Suite 420,
Los Angeles, Calif. 90010,
(213) 380-2082,
Counsel for Respondents.

PETITION FOR CERTIORARI FILED MAY 7, 1982
CERTIORARI GRANTED JULY 2, 1982

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Chronological List of Important Dates and Docket Entries.

1. April 26, 1979 — Frank L. Todd, et al. ("Trustees") file a breach of contract suit against Jim McNeff, Inc. ("McNeff, Inc."), pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185, in the Federal District Court for the Central District of California.

2. June 27, 1979 — McNeff files an answer to the Trustees' breach of contract suit.

3. January 15, 1980 — Trustees file a Motion for Summary Judgment.

4. January 21, 1980 — McNeff files a Motion for Summary Judgment.

5. February 11, 1980 — The District Court entered its order granting Trustee's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment.

6. March 13, 1980 — McNeff, Inc. files a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

7. February 8, 1982 — The United States Court of Appeals issues its Judgment and Opinion, *Todd v. McNeff*, 667 F.2d 800 (1982).

8. May 7, 1982 — McNeff, Inc. files its Petition for Writ of Certiorari with the United States Supreme Court (No. 81-2150).

9. July 2, 1982 —	United States Supreme Court grants Petition for Writ of Certiorari.

ITEM 1.
Complaint for Breach of Collective Bargaining Agreement.

United States District Court, Central District of California.

Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William Cobb, Jr., C. W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd and Jerry Toll, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C. V. Holder, William A. Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C. I. T. Johnson, Dale I. Vawter, Don McCoy, William A. Cobb, Jr., Alexander Rados, William A. Floyd and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Dahnke, Winton Kemmis, William A. Floyd and Don MacIntosh, each in his respective capacity as Trustee of the Operating Engineers Training Trust, Plaintiffs, vs. Jim McNeff, Inc., a California corporation, and Jim McNeff, an individual, doing business as Jim McNeff Trucking and Equipment Rentals, Defendants. Case No. 79-1527 IH.

Filed: April 26, 1979.

Plaintiffs Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William Cobb, Jr., C. W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd, Jerry Toll, C. V. Holder, Edwin Kalish, Steve Billy, Winton Kemmis, Dean Sweeney, Jr., C. I. T. Johnson, Don McCoy, Robert Lytle, Kenneth J. Bourguignon, and Don MacIntosh complain and allege as follows:

1. This action for breach of contract is to recover fringe benefit contributions obligated by the terms of a collective bargaining agreement and is brought by the Trustees of certain joint Labor-Management Trusts created pursuant to 29 U.S.C. §186(c).

2. This Court has jurisdiction under 29 U.S.C. §185, insofar as this is a cause of action involving a breach of a collective bargaining agreement.

3. Plaintiffs, Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Gerald B. Laird, William Cobb, Jr., C. W. Poss, Verne W. Danhke, Alexander Rados, William A. Floyd and Jerry Toll are Trustees and together constitute the Board of Trustees of the Operating Engineers Health and Welfare Fund, and bring this action in their official capacities as such.

4. Plaintiffs, Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C.V. Holder, William Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., are Trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust, and bring this action in their official capacities as such.

5. Plaintiffs, Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C.I.T. Johnson, Dale I. Vawter, Don McCoy, William Cobb, Jr., Alexander Rados, William A. Floyd, and Dean Sweeney, Jr. are Trustees and together constitute the Board of Trustees of the Operating Engineers Vacation-Holiday Savings Trust, and bring this action in their official capacities as such.

6. Plaintiffs, Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Danhke, Winton Kemmis, William A. Floyd and Don MacIntosh are Trustees and together constitute the Board of Trustees of the Operating Engineers Training Trust, and bring this action in their official capacities as such.

7. Said Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust (hereinafter collectively denominated "Trusts") are express trusts created and adopted by collective bargaining agreements between the International Union of Operating Engineers, Local Union No. 12 (hereinafter "Local 12"), and various employer associations in the construction industry in Southern California.

8. Plaintiffs are informed and believe and allege thereon that defendant Jim McNeff, Inc., has for all relevant times been a corporation organized and existing under and by virtue of the laws of the State of California and transacting business as a construction contractor therein. Plaintiffs are informed and believe and allege thereon that defendant Jim McNeff is an individual who is the principal of Jim McNeff, Inc. and who also is the sole proprietor of an equipment rental company known as Jim McNeff Trucking and Equipment Rental.

9. On or about September 13, 1978, Jim McNeff, Inc. executed and delivered to Local 12, a written short-form collective bargaining agreement (hereinafter "Agreement") wherein Jim McNeff, Inc. agreed to be bound by all the terms and conditions of written and existing multi-employer agreements, and in particular the Master Labor Agreement (hereinafter "MLA"), in effect in the area in which Jim McNeff, Inc. was working and applicable to its operations and to all renewals, modifications and extensions thereof. A true copy of said Agreement is attached hereto as Exhibit "A".

10. Jim McNeff, Inc. also agreed to be bound by the Trust Agreements establishing the Operating Engineers Trusts, and further agreed said Agreement shall continue in full force and effect unless either party shall give written notice to the other party at least sixty (60) days prior to the termination of the MLA, of its desire to terminate the Agreement. At all times relevant herein, neither party has given notice to terminate, and said Agreement, as well as the MLA and the Trust Agreements have been in full force and effect.

11. By said Agreement, and in accordance with the terms of the MLA, Jim McNeff, Inc. promised that it would contribute and pay fringe benefit contributions to the respective Trusts referred to herein at the rates specified in the Agreement and MLA for each hour worked (or paid) by employees covered by the Agreement and MLA. Said Agreement further provided that amounts would be paid to said Trusts at their place of business in the City of Los Angeles, County of Los Angeles, State of California on or before the tenth (10th) day of each successive month. Plaintiffs are informed and believe and allege thereon that Jim McNeff, Inc. has not complied with its duty to pay fringe

benefit contributions due on hours worked (or paid) its covered employees.

12. Plaintiffs are informed and believe and allege thereon that Jim McNeff doing business as Jim McNeff Trucking and Equipment Rental is a joint employer together with Jim McNeff, Inc. and is, for purposes of this action, bound to the terms and conditions of the Agreement, MLA and Trust Agreements relevant herein.

13. Jim McNeff, Inc. is bound by the terms of the MLA and the Trust Agreements to allow an audit of its records to be conducted at a reasonable time and place upon written notice by the plaintiffs. Plaintiffs representatives appeared at the offices of Jim McNeff, Inc. on March 29, 1979, after the giving of written notice, to conduct an audit. No records were made available to them at that time.

14. Jim McNeff, Inc. further promised in the event of delinquency, it would pay all legal and auditing costs in connection with the delinquency, whether or not litigation were required to recover the unpaid contributions. Plaintiffs will conduct an audit of the books of Jim McNeff, Inc. as part of this litigation and the plaintiffs are entitled to reasonable costs for such audit.

15. By said Agreement and in accordance with the terms of the MLA, Jim McNeff, Inc. further promised that in the event any of said monthly contributions were not paid when due, it would pay the sum of $25.00 or ten percent (10%) of the total amount of the particular contributions when due, whichever is greater, for each delinquency, as and for liquidated damages and not as a penalty.

16. Plaintiffs and the Trusts and each of them have complied with all conditions precedent on their part to be performed under the terms of the aforementioned Agreement.

17. It has been necessary for the plaintiffs to engage the law firm of Wayne Jett, Lawyers, for the purpose of collecting said contributions and damages, and the Trusts are entitled to reasonable attorneys' fees in connection therewith.

WHEREFORE, plaintiffs pray for judgment as follows:

1. For contributions in an amount as by proof may be shown to be due;

2. For the reasonable costs of an audit of defendants' books and records;

3. For interest at the rate of seven percent (7%) per annum upon sums due from due dates;

4. For reasonable attorneys' fees;

5. For plaintiffs costs of suit;

6. For such other and further relief as this Court may deem just and proper.

DATED: April 25, 1979

WAYNE JETT, LAWYERS
By: /s/ Jon Crane
Jonathan B. Crane

EXHIBIT A.

AGREEMENT
WITH
THE INTERNATIONAL UNION OF
OPERATING ENGINEERS
LOCAL UNION NO. 12

THIS AGREEMENT is entered into this 13 day of Sept., 1978, by and between Jim McNeff Inc., hereinafter referred to as the CONTRACTOR, and the International Union of Operating Engineers, Local Union No. 12, hereinafter referred to as the UNION.

ARTICLE I

The CONTRACTOR hereby recognizes the UNION as the sole and exclusive bargaining representative of all employees of the CONTRACTOR performing work over which the UNION has jurisdiction.

ARTICLE II

The CONTRACTOR, not being signatory to any recognized Operating Engineers' multiple-employer agreement, hereby agrees to accept and be bound by all of the terms and conditions of multiple-employer agreements applicable to the CONTRACTOR'S operations and in effect in the area in which the work is performed as recognized, modified, re-negotiated, amended, and renewed from time to time through collective bargaining between the UNION and the applicable multiple-employer group. It is hereby agreed that the multiple-employer agreement(s) indicated below is the one most applicable to the EMPLOYER'S operations. Such multiple-employer agreement(s) is hereby adopted in its entirety, except those provisions in such multiple-employer agreement(s) which are in conflict with this agreement. Wherever such conflict exists the provisions of this agreement shall apply.

ARTICLE III

To the extent that any provisions in applicable multiple-employer agreements, adopted herein by reference, contain provisions with respect to grievance procedures, arbitrations (other than jurisdictional disputes under the Impartial Jurisdictional Disputes Board in the Building and Construction Industry), or commitments not to strike over grievances or claims of contract violation, the same shall not be in effect nor binding upon the parties to this agreement. In the place of such provisions the parties mutually agree to meet and attempt to settle all such grievances and claims of contract violation by direct negotiation between duly authorized representatives of each of the parties.

If the parties are unable to settle or adjust any such grievance or claim of contract violation, nothing contained in this agreement, expressly or by implication, shall in any way limit or modify the right of each party to enforce this agreement or adjust grievances by means of judicial or economic procedures, including picketing or withholding of services, except that enforcement of the subcontracting clause shall be by judicial procedures.

ARTICLE IV

This Agreement shall become effective as of the date shown above and shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof, unless either party shall give written notice to the other party, not less than ninety (90) nor more than one hundred twenty (120) days prior to the termination date of the appropriate multiple-employer agreement, of its desire to terminate.

ARTICLE V

The multiple-employer agreement(s) indicated below is hereby adopted as the agreement(s) most nearly applicable to the employer's operations. It shall be considered in full

force and effect in the Union's geographic jurisdiction and in accordance with the provisions of Article II above.

(✓) Master Construction Agreement

EMPLOYERS:

Jim McNeff Inc.
Name of Company (Pls. Print)

92-241 National Ave. Box 949
Company Address

Mecca, Ca 92254
City, State Zip

342380
State License Number

Jim McNeff
Signed by

Jim McNeff
Signed by (Pls. Print)

President
Title

92-241 National Ave. Box 949 Mecca, Ca
Signatory Address

563-68-9170
Signatory Social Security No.

396-2592
Telephone Number

9-13-78
Date

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO.12

Wm. C. Waggoner
Business Manager

Verne W. Dahnke
President

Dale I. Vawter
Recording-Corresponding Secretary

Jerry Lanham
Business Representative

NAME OF COMPANY Jim McNeff Inc. STATE LICENSE NO. 342380

Street Address 92-241 National Ave. P.O. Box 949

City Mecca; State Calif.; Zip Code 92254; Phone 396-2592

Check Appropriate designation below:

☑ CORPORATION

R. M. O. Jim McNeff

Corporation: (List Officers)

President Jim McNeff
Vice-President
Secretary Christene McNeff
Treasurer

Incorporated in State of California on Jan. 26, 1978

Has your company or anyone associated with your company ever been associated with any other employer who at any time has been signatory to a labor agreement with IUOE, Local Union 12?

If so, give the name(s) of such other employer(s).

ACKNOWLEDGMENT AND ACCEPTANCE OF TRUST CHECK APPROPRIATE BOX AND SIGN ALONGSIDE APPLICABLE TRUST INDICATING ACCEPTANCE.

The undersigned employer by his signature acknowledges receipt of a true and correct copy of the Agreement establishing the Operating Engineers Trusts:

AND, further by his signature, accepts all of the terms and conditions of said Trust Agreements and agrees to be bound thereto in every way, including the obligation to make periodic contributions and payments pursuant to the requirement of the Board of Trustees consistent with said Trust Agreements and the Collective Bargaining Agreement

between said employer and Local 12, International Union of Operating Engineers.

A) PENSION TRUST	☑ By: Jim McNeff; Title Owner
B) HEALTH & WELFARE TRUST	☑ By: Jim McNeff; Title Owner
C) VACATION-HOLIDAY TRUST	☑ By: Jim McNeff; Title Owner
D) APPRENTICE TRUST	☑ By: Jim McNeff; Title Owner
E) JOURNEYMAN TRAINING TRUST	☑ By: Jim McNeff; Title Owner
F) INDUSTRY FUND TRUST	☑ By: Jim McNeff; Title Owner

DATE 9-15-78

Trust Copy

ITEM 2.
Answer to Complaint for Breach of Contract.

United States District Court, Central District of California.

Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William A. Cobb, Jr., C.W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd and Jerry Toll, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C.V. Holder, William A. Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C.I.T. Johnson, Dale I. Vawter, Don McCoy, William A. Cobb, Jr., Alexander Rados, William A. Floyd, and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Dahnke, Winton Kemmis, William A. Floyd and Don MacIntosh, each in his respective capacity as Trustee of the Operating Engineers Training Trust, Plaintiffs, vs. Jim McNeff, Inc., a California corporation, and Jim McNeff, an individual doing business as Jim McNeff Trucking and Equipment Rentals, Defendants. Case No. 79 1527 IH.

Filed: June 27, 1979.

Defendants answer the Complaint as follows:

1. Answering paragraphs 3, 4, 5 and 6, defendants lack sufficient information or belief to answer the allegations of said paragraphs, and basing their denial on that ground, deny each and every allegation therein contained.

2. Answering paragraphs 10, 11, 12, 13, 14, 15, 16 and 17, defendants deny each and every allegation therein contained.

3. Answering paragraphs 1, 2, 7, 8 and 9, defendant admits the allegations therein contained.

FIRST AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION

4. The Operating Engineers Union has never represented a majority of any defendants' employees. Thus, there was never a valid collective bargaining agreement between the Operating Engineers Union and any defendants.

SECOND AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION

5. The collective bargaining agreement which the Complaint asserts exists between the Operating Engineers Union and defendants is a contract of adhesion, and thus, unenforceable at law.

THIRD AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION

6. Plaintiffs are not properly licensed and registered with the State of California as a collection agency, and thus, may not legally bring this action.

FOURTH AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION

7. Defendant Jim McNeff, Inc.'s execution of Exhibit A to the Complaint was under duress and was based in part on fraudulent misrepresentation re its meaning and effect.

WHEREFORE, defendants pray:

1. That plaintiffs take nothing by the suit herein;

2. Costs of suit;

3. For such other and further relief as the Court may deem proper.

DATED: June 25, 1979.

Respectfully submitted,
/s/ Steven D. Atkinson
STEVEN D. ATKINSON
Attorney for Defendants

ITEM 3.
Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

United States District Court, Central District of California.

Frank L. Todd, et al., etc., Plaintiffs, vs. Jim McNeff, Inc., et al., Defendants. No. CV 79-1527 IH.

Date: February 4, 1980.

Time: 10:00 A.M.

Plaintiffs, Frank L. Todd, et al., as Trustees of the Operating Engineers Trusts, submit the following Points and Authorities in support of their motion for summary judgment against Jim McNeff, Inc.

I
INTRODUCTION

This is an action for fringe benefit contributions and damages. Plaintiffs are the Trustees of four joint Labor-Management Trusts established by collective bargaining agreements between the International Union of Operating Engineers, Local No. 12 (hereinafter "Local 12") and various employer associations in Southern California. The defendant, Jim McNeff, Inc. is a California corporation which signed a short-form collective bargaining agreement with Local 12 (hereinafter "Agreement"). The Agreement incorporated by reference the Master Labor Agreement between Local 12 and the various employer associations of contractors in Southern California.

The damages claimed by plaintiffs are based on an audit conducted of Jim McNeff, Inc.'s books and records. The audit showed that Jim McNeff, Inc. failed to report or pay the fringe benefit contributions due under the Agreement and Master Labor Agreement with Local 12. Jim McNeff,

Inc. had operating engineers dispatched to the company from Local 12 but did not pay fringe benefit contributions on those employees.

Thereafter, the results of the audit were delivered to Jim NcNeff, Inc. The company then requested an election with the National Labor Relations Board (hereinafter "Board") to determine if Local 12 represented a majority of Jim McNeff, Inc.'s employees. The plaintiff trustees were not joined as a party in the request for an election by Jim McNeff, Inc.

Local 12 then filed an unfair labor charge against Jim McNeff, Inc. The plaintiffs were not a party to that charge either. The general counsel for the Board refused to file a complaint against Jim McNeff, Inc. based on the charge by Local 12. No hearing, either judicial or administrative, was held by the Board concerning the unfair labor practice charge.

As of the date of this motion, the Board has not held an election for the employees of Jim McNeff, Inc.

At the mandatory status conference held on December 18, 1979, the Court ordered the plaintiffs and the defendant to simultaneously file motions for summary judgment on January 14, 1980, and set a hearing date for February 4, 1980, on the motions. For the reasons set forth hereafter, plaintiffs contend that this court should enter summary judgment in their favor and against Jim McNeff, Inc.

II

THIS COURT HAS JURISDICTION OF THIS ACTION PURSUANT TO SECTION 301(a) OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 [29 U.S.C. § 185(a)].

The recent Ninth Circuit cases of *Burke v. Ernest W. Hahn, Inc.*, 592 F.2d 542 (9th Cir. 1979) and *Waggoner v. C & D Pipeline Co.*, 601 F.2d 456 (9th Cir. 1979)

involved actions by the predecessor trustees to the plaintiffs and involved the same Master Labor Agreement in dispute in this action. Therefore, it is clear that there is federal jurisdiction in this action.

III

THERE ARE NO MATERIAL ISSUES OF FACT IN DISPUTE IN THIS ACTION BETWEEN PLAINTIFFS AND JIM MC NEFF, INC.

This action involves the determination of the following material facts:

A. Whether Jim McNeff, Inc., signed and became bound to a collective bargaining agreement with Local 12 on September 13, 1978.

B. If there is a collective bargaining agreement between Local 12 and Jim McNeff, Inc, whether Jim McNeff, Inc., breached the Agreement by failing to pay fringe benefit contributions to the Operating Engineers Trusts.

C. If there was a breach of the Agreement, whether plaintiffs' calculation of damages is accurate.

It is undisputed that on September 13, 1978, Jim McNeff, the president of Jim McNeff, Inc., signed the documents attached to the declaration of Leo A. Majich.

It is also undisputed that the three employees of Jim McNeff, Inc., became members of Local 12 shortly thereafter.

It is further undisputed that there has been no administrative hearing by the Board concerning the validity of this collective bargaining agreement. This Court cannot use principles of Res Judicata, or collateral estoppel, where there has never been a judicial hearing and where these plaintiffs have never had an opportunity to litigate the issues.

The Supreme Court stated:

> "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the Courts have not hesitated to apply res judicata to enforce repose."
> *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560 (1966).

There has not been a judicial hearing before an administrative law judge to estop the plaintiffs from enforcing the contract. The plaintiffs are trustees of fringe benefit trusts and are independent fiduciaries under the terms of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1104 et seq.).

The Board recognizes the independent relationship between the Trustees, the Union, and the Employers.

> "While the Operating Engineers Pension Trust Fund is a joint labor-management Fund established pursuant to Section 302(c)(5) of the Act, the trustees are fiduciaries under ERISA, whose sole obligation is to the beneficiaries of the Fund, and not to either of the collective bargaining parties. Although the trustees may entertain the recommendations of their appointing parties, they are bound to use their independent judgment with respect to the administration of the Trust Fund. Accordingly, we do not feel that the interest of the Trustees were adequately protected by allowing their counsel to consult with counsel for the [Union] during the hearing." *Camay Drilling Company*, 239 NLRB No. 138, at fn. 10.

In the *Camay* case, the Board reversed the decision of the administrative law judge because the Trustees were not permitted to participate as a party at the hearing, even though the trustees were notified of and represented by counsel at the hearing. In this case, there has never been a hearing and

the trustees were never notified of any charges being filed by the employer or the Union.

The jurisdiction of the Board does not extend to the independent interpretation of labor agreements. National Labor Relations Act Section 10 (a), 29 U.S.C § 160(a), *Provision House Workers Union, Local 274 v. NLRB*, 493 F.2d 1249 (9th Cir. 1974). A breach of a written collective bargaining agreement may not be an unfair labor practice subject to the jurisdiction of the Board. *Id.*

The holding of an election by the Board is likewise an event which has no collateral estoppel consequences to the action herein. In *Inland Empire Counsel v. Millis*, 325 U.S. 697 (1945), the Supreme Court discussed the Board's function in election proceedings as follows:

> "These requirements are related to the character of the proceeding of which the hearing is only a part. That proceeding is not technical. It is an investigation, essentially informal, not adversary. The investigation is not required to take to any particular form or confined to the hearing." 325 U.S. at 706-707.

In *Paramount Transport Systems v. Chauffeurs Local 150*, 436 F.2d 1064 (1971), the Ninth Circuit stated that res judicata

> "should be accorded only to those findings upon material issues that are supported by substantial evidence on the administrative record as a whole." *Id.*, 436 F.2d at 1066.

Therefore, the factual and legal determination of the existence of a contract between McNeff, Inc. and Local 12 has never been decided. Therefore, this Court should find that because McNeff, Inc. signed a written collective bargaining agreement and because its employees became members of Local 12 shortly thereafter, there is a valid and enforceable agreement.

The Agreement and Master Agreement signed by McNeff, Inc. clearly requires McNeff, Inc. to pay fringe benefit contributions to the plaintiffs based on the hours worked by or paid to its employees performing work covered by the Agreement. See Articles VI, VII, VIII, IX and X, pp. 72-77, and attachment No. 2, p. 148, Master Labor Agreement attached to declaration of Leo A. Majich.

It is undisputed that McNeff, Inc. never reported or paid any fringe benefit contributions to the plaintiffs.

The audit conducted of the defendant's books and records shows that it had operating engineers dispatched to it to perform operating engineer work. The Master Labor Agreement has been interpreted by the Ninth Circuit to require fringe benefit contributions on those employees dispatched to a contractor, regardless of the particular task assigned to the operating engineer by the employer. *Waggoner v. C & D Pipeline Company, supra,* at 459. Therefore, the failure of McNeff, Inc. to report and pay fringe benefit contributions on its operating engineers dispatched by Local 12 establishes the breach of the Master Labor Agreement. The mechanical calculations of the actual hours worked by the employees of Jim McNeff, Inc. by the auditor has not been contested. Therefore, the calculation of damages is accurate and this Court should enter judgment in that amount.

The audit, in addition to making a claim on the employees of Jim McNeff, Inc., makes a claim on two "owner-operators" who were paid by Jim McNeff, Inc. The Master Labor Agreement contains specific requirements concerning the use of owner-operators by contractors. See Article XII, R, pp. 101-104 of Master Labor Agreement. Jim McNeff, Inc. was required to make each of the owner-operators its bona fide employee, effective from the first hour of work performed on the job or project. Master Labor Agreement,

p. 103. The Ninth Circuit has upheld the legality of this clause in enforcing a companion master agreement between Local 12 and the Field Surveyors Association. *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1114-1115 (1979).

The three material issues of fact to be resolved by this Court are not in dispute. Therefore, summary judgment is appropriate. Because the Ninth Circuit has already ruled on the interpretation of this Master Labor Agreement, this Court should enter summary judgment in favor of plaintiffs for the full amount of the audited claim.

IV

THE RECENT SUPREME COURT DECISION OF *N.L.R.B. v. LOCAL UNION NO. 103* IS NOT A LEGAL DEFENSE TO THIS ACTION.

Defendant Jim McNeff, Inc. has indicated that it will rely on *N.L.R.B. v. Local Union No. 103*, ___ U.S. ___, 98 S.Ct. 651 (1978) ("Higdon"). In this case, the Supreme Court determined whether a union violated section 8(b)(7)(c) of the National Labor Relations Act [29 U.S.C. § 158(b)(7)(c)] by picketing to protest alleged violations of a pre-hire contract entered into by Local 103 and Higdon pursuant to section 8(f) of the NLRA [29 U.S.C. § 158(f)]. The Supreme Court upheld the decision by the Board, even though it expressed doubts concerning the Board's decision. *N.L.R.B. v. Local Union No. 103, supra*, at 660. The holding of *Higdon* can be summarized as follows: The NLRB did not abuse its discretion in holding that pre-hire contracts cannot be enforced by picketing if the union has never obtained a majority status.

The holding in *Higdon* does not apply here, where Local 12 obtained a clear majority of employees several days after

McNeff, Inc. voluntarily signed the 8(f) agreement. The Supreme Court states:

> "It is also undisputed that when the union successfully seeks majority support, the pre-hire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majoity of the employees in the unit." *N.L.R.B. v. Local Union No. 103, supra,* at 660.

The Supreme Court stated that majority status is a subject for ligitation in a section 301 suit to enforce a section 8(f) contract. *N.L.R.B. v. Local Union No. 103, supra,* at 661. Here, the facts establish that Local 12 was a majority union and the employer voluntarily had members of Local 12 dispatched to its company to perform operating engineer work. There was no picketing involved in this action. The company merely breached its collective bargaining agreement by failing to pay the fringe benefit contributions due its employees performing operating engineer work and further failed to abide by the terms of the contract in making owner-operators its bona fide employees. After the company was caught by the trust's auditor, it then attempted to avoid a contract it had used to its benefit.

Therefore, the decision in *N.L.R.B. v. Local Union No. 103, supra,* supports plaintiffs' position.

As an additional item to distinguish the *Higdon* case from the dispute herein, the *Higdon* contract did not have a "union security" clause such as the one in the Master Labor Agreement herein. Such a clause requires an employer, here Jim McNeff, Inc., to utilize employees who are members of the union. The Third Circuit in *N.L.R.B. v. Irvin-McKelvey,* 475 F.2d 1265 (3rd Cir. 1975) cited in *Higdon* (98 S.Ct. at 658), gave great weight to the presence of a union security clause in the pre-hire agreement. The court stated:

> "... When the union's role has, by the operation of [union security] clauses, been brought home to the employees quite directly, and they have refrained from seeking a representation election, an employer is not free to repudiate his section 8(f) contract during its term." *N.L.R.B. v. Irvin-McKelvey, supra,* at 1271.

Article II, D and E of the Master Labor Agreement, pp. 11-12, are union security clauses. Article II, D, requires employees to have gained union membership within eight days of first employment and to remain members as a condition of continued employment. Article II, E, requires the employer to discharge any employee who does not maintain his union membership.

The *Higdon* case took place in a "right-to-work" state where there was no union security clause and where it was impossible to determine if the union signatory to the prehire agreement had in fact represented the majority of employees involved. *N.L.R.B. v. Local Union No. 103, supra,* at 652.

The union security clauses of the Master Labor Agreement give rise to a presumption of majority status on the part of the union. The facts show that the employees in fact became members of Local 12. The defendant has no affirmative evidence to the contrary. Furthermore, if the employer, in breach of its agreement with Local 12, employed persons who were not members of Local 12, it cannot use its own breach of the contract as a defense to the enforcement of the very contract it violated.

V

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court enter summary judgment in favor of plaintiffs for

the full amount of fringe benefit contributions and damages requested.

Dated: January 14, 1980.

Respectfully submitted,
WAYNE JETT, LAWYERS
By: Christopher M. Laquer
Christopher M. Laquer
Counsel for Plaintiffs

ITEM 4.
Declaration of Jack E. McClendon in Support of Plaintiffs' Motion for Summary Judgment With Exhibit A Thereof.

United States District Court, Central District of California.

Frank L. Todd, et al., Plaintiffs, vs. Jim Mc Neff, Inc. et al., Defendants. No. CV-79-1527-IH.

Date: February 4, 1980.

Time: 10:00 a.m.

State of California, County of Los Angeles — ss.

I, JACK E. McCLENDON, declare:

1. I make this declaration in support of plaintiffs' motion for summary judgment in the above referenced action.

2. At all times since January, 1978, I have been and am now employed as an auditor for the Southern California Operating Engineers Benefits Administration, Inc. Said organization is a non-profit corporation, organized and existing to perform administrative services exclusively for the Operating Engineers Trusts. My job duties consist of examining the books and records of employers bound to the Collective Bargaining Agreements with the International Union of Operating Engineers, Local No. 12 (hereinafter "Local 12") to verify that the employer is properly paying all of the fringe benefit contributions due the Operating Engineers Trusts pursuant to the particular collective bargaining agreement signed by the contractor.

3. Pursuant to a written request by the Operating Engineers Trusts, I went to the business address of Jim McNeff, Inc., located at 92241 National Avenue, Mecca, California, to conduct an audit. At that time, I met Mr. Jim McNeff, who gave me the check register for Jim McNeff,

Inc. The Operating Engineers Trusts had requested time cards, payroll ledgers, individual employee wage records, federal and state tax returns and all cash disbursements journals. Mr. McNeff advised me that there were no tax returns for the corporation because he had never filed a return with either the United States Government or the State of California. Mr. McNeff further stated that he did employ men doing some operating work but they were working for his "non signatory" company known as Jim McNeff Trucking and Equipment Rentals. Because I was unable to examine all of the normal business records, I requested our attorneys to cause the employer to furnish the additional records needed to complete the audit properly.

4. Pursuant to an agreement entered into between Mr. McNeff and our attorneys, I was able to complete my audit of Jim McNeff, Inc. on June 1, 1979, at the offices of Jewel Garrett, the bookkeeper for Jim McNeff, Inc, in Indio, California. At that time, I still did not examine any tax return or tax records of the corporation because they apparently did not exist. I examined all of the records supplied to me relating to Jim McNeff, Inc., and made notes relating to payments to individuals who may have been performing work as operating engineers. During the course of the audit, I called the offices of Local 12 to determine whether any of the individuals paid by Jim McNeff, Inc. were members of Local 12. I determined that the three employees of Jim McNeff, Inc., had been dispatched by Local 12 to the company on September 15, 1978. On June 6, 1979, I prepared a memorandum to Leo A. Majich, the administrator of the Operating Engineers Trusts, summarizing the information I obtained as a result of my examination of the books and records on June 1, 1979. I further prepared a summary of the claim broken down for each employee and each month where a claim for fringe benefit contributions was made.

Attached hereto as Exhibit "A" and by this reference incorporated herein is a true and correct copy of my memorandum dated June 6, 1979, to Leo A.Majich and my accounting summary which I personally prepared.

5. Attached hereto as Exhibit "B" is a true and correct copy of the check off authorization for the three employees dispatched by Local 12 to Jim McNeff, Inc., which I obtained from the offices of Local 12.

I declare under penalty of perjury that the above is true and correct.

Executed on January 14, 1980, at Pasadena, California.

/s/ Jack E. McClendon
Jack E. McClendon

EXHIBIT A.

MEMORANDUM

TO: LEO A. MAJICH JUNE 6, 1979

FROM: JACK E. MC CLENDON

SUBJECT: PAYROLL AUDIT Account #: 342380

EMPLOYER: JIM MCNEFF, INC.
Signatory to So. Calif. Constr. Agreement (AS)

An audit of the payroll and related records was performed on this employer on June 1, 1979, to ascertain that all hours have been reported to these Trusts correctly. This audit included examination of cash disbursements in the form of check stubs. The audited period was September 13, 1978, through April 1979.

The audit resulted in finding a deficiency of these Trusts. The claim involves:

1. M. Felix (561-60-2708) dispatched 9/15/78. Mr. Felix was paid two (2) different hourly wage rates; $7.00 per hour for work other than operating and $12.14 per hour worked while operating equipment. When no hourly wage appeared on the check stubs the amount earned was divided by the operating rate of $12.14.
2. D. Reed (528-28-8914) dispatched 9/15/78. Paid at two (2) different hourly wage rates. When no hourly rate appeared the claim is made on the operating rate.
3. M. Deacon (554-82-7622) dispatched 9/15/78. Paid at two (2) different hourly wage rates. When no hourly rate appeared the claim is made on the operating rate.

4. D. Hendrickson. No Social Security Number. Claimed as the disbursements identified the employee as Doug Hendrickson Back Hoe Service.
5. L. Wilson (564-50-8004) an I.U.O.E., Local 12 member. Owner-Operator. No hourly rate was given. The amount earned was divided by an estimated Owner-Operater rate of $30.00

The agreement the employer has with I.U.O.E., Local No. 12, provides that all work performed and all services rendered by employees shall be rendered under terms and provisions at no less than those specified in the agreement. The total unreported hours for the audited period are 1094.5 in the amount of $4,651.63. distributed as follows:

Vacation/Holiday	$ 766.15
Health & Welfare	1,203.95
Pension	2,517.35
Apprentice/Journeyman	153.23
Industry Advancement	10.95
Total	$4,651.63
10% Liquidated Damages	$ 465.16
Audit Assessment	200.00
Total	$ 665.16
TOTAL AMOUNT DUE	$5,316.79

The distribution of hours per employee per month is detailed on the attached sheet.

JEM/lde
cc: Wayne Jett
Jonathan B. Crane

ITEM 5.
Declaration of Leo A. Majich in Support of Plaintiffs' Motion for Summary Judgment with Excerpts of Exhibit D Thereof.

United States District Court, Central District of California.

Frank L. Todd, et al., etc., Plaintiffs, vs. Jim McNeff, Inc., et al., Defendants. Case No. CV 79-1527 IH.

Date: February 4, 1980.

Time: 10:00 a.m.

State of California, County of Los Angeles — ss.

I, Leo A. Majich, declare:

1. I make this declaration in support of plaintiffs' motion for summary judgment in the above-referenced action.

Declarant's Qualifications

2. At all times since January, 1972, I have been and am now the Administrator of the Southern California Operating Engineers Benefits Administration, Inc. Said organization is a non-profit corporation, organized and existing to perform administrative services exclusively for the Operating Engineers Health & Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (hereinafter collectively referred to as "Trusts").

3. From 1952 through December, 1971, I was principally employed in the construction industry in Southern California, and was part-owner of a construction contracting company. During that period of time, my company was a member of the Associated General Contractors' of California, Inc. (hereinafter "AGC"), an organization established and existing to promote the interests of employers in the construction industry in Southern California. I served as

president of AGC during 1966 and 1967. I was a member of its board of directors from 1962 through 1964 and again from 1966 through 1969. In was a member of the AGC Labor Committee from 1955 through 1971. In 1964 I became chairman of the AGC Labor Committee and, at the same time, became chairman of the Southern California Contractors' Negotiating Committee. This Committee was and is the Committee which represents the several multiemployer associations for the construction industry in Southern California in labor negotiations with various construction trade unions, one of which was the International Union of Operating Engineers, Local Union No. 12 (hereinafter "Local 12"). As chairman of the Negotiating Committee, I was the spokesman in substantially all matters relating to negotiations of industry-wide collectively bargainined agreements with Local 12. In 1969, I served as the chairman of the Negotiating Committee in negotiating an industry-wide collective bargaining agreement with Local 12. As a result of these negotiations, a Master Labor Agreement was entered into between the Southern California General Contractors' Associations and Local 12 for the period of 1969 to 1974.

4. In addition, I have served at various times as a Trustee of various of the Operating Engineers Trusts. I was one of the original Trustees of the Operating Engineers Health & Welfare Fund and served as trustee from 1958 through 1966, and from 1969 through 1971. I was the original Chairman of the Board of Trustees of the Operating Engineers Pension Trust from 1959 through 1966. From 1969 until December, 1971, I served as Trustee of the Operating Engineers Pension Trust and Operating Engineers Vacation-Holiday Savings Trust

5. In my capacity as Administrator of the Trusts, I am the person chiefly responsible to the Board of Trustees of

each of the Trusts for supervising the staff which performs administrative functions for the Trusts. These administrative functions include receiving monthly reports and fringe benefit contributions from employers, apportioning amounts received to the appropriate Trusts, crediting individual employees for work performed, handling claims and determining entitlement to benefits for beneficiaries, and maintaining substantially all business records of the Trusts.

6. Based on the foregoing, I have first hand knowledge and am intimately familiar with the operations of each of the Trusts, the meaning of the Master Labor Agreements between Local 12 and the employers and the custom and practice of employers and Local 12 concerning all aspects of the Master Agreements.

Practice of Maintaining Employer Files

7. The administrative office of the Trusts, of which I am in charge, maintains an employer file for each employer signed to a collective bargaining agreement with Local 12. This employer file customarily contains the original or copy of any written agreement between the employer and Local 12, original monthly reports (showing identities of employees, hours worked and contributions due) submitted by the employer to the administrative office, the originals or copies of correspondence regarding the employer, a record of claims made by employees that certain hours worked by the employee have not been properly reported or paid by the employer, a copy of any audit of the employer's business records made on behalf of the Trusts to verify proper reporting of hours and, where the employer has failed to pay amounts that are due, copies of statements to the employer showing the amount due each of the Trusts.

Labor Agreement Identified and Described

8. I have reviewed the employer file maintained by the Trusts for defendant Jim McNeff, Inc. (hereinafter "McNeff") and, based thereon, am able to state the following:

A. Attached hereto as Exhibit "A", and by this reference incorporated herein is a true and correct copy of the original document entitled "Agreement with the International Union of Operating Engineers, Local Union No. 12" which is dated September 13, 1978, and signed by Jim McNeff as president of Jim McNeff, Inc.

B. Attached hereto as Exhibit "B", and by this reference incorporated herein is a true and correct copy of a document entitled "Acknowledgment and Acceptance of Trusts" signed by Jim McNeff on behalf of Jim McNeff, Inc.

C. Attached hereto as Exhibit "C", and by this reference incorporated herein are true and correct copies of the original monthly reports submitted to the Trusts by McNeff for the months of October, 1978 through March, 1979. McNeff has not filed any monthly report with the Trust since March, 1979.

D. Attached hereto as Exhibit "D", and by this reference incorporated herein is a true and correct copy of the Master Labor Agreement between Local 12 and the Southern California General Contractors' Associations for the period of July 1, 1977, to June 15, 1980 (hereinafter "Master Agreement"). This is the Master Construction Agreement referred to in the Agreement signed by Local 12 and McNeff.

E. Attached hereto as Exhibit "E", and by this reference incorporated herein is a true and correct copy of the Agreement and Declaration of Trust Establishing the Operating Engineers Health and Welfare Fund.

F. Attached hereto as Exhibit "F", and by this reference incorporated herein is a true and correct copy of the letter from the Trusts to McNeff dated November 30, 1978, requesting an audit of McNeff's payroll records. A review of the correspondence and memoranda of telephone conversations in the McNeff file show that this audit date was postponed several times and eventually conducted on June 1, 1979.

9. Based on my personal work as a contractor in Southern California, as a negotiator for AGC in its negotiations with Local 12 for the Master Labor Agreements, as a Trustee of the Trusts, and as Administrator of the Trusts, I have personal knowledge of the custom and practice in the construction industry in Southern California relating to the collective bargaining agreements between contractors and Local 12. Since I have been a contractor, the custom and practice in the construction industry in Southern California regarding "short-form" agreements with Local 12 is that when a contractor signs a short-form agreement with Local 12, the contractor's existing employees who were performing work covered by the Master Agreement are permitted to join Local 12 immediately, thereby permitting the contractor to keep its existing work force and permitting the employees to become members of Local 12 without an apprenticeship.

10. Attached hereto as Exhibit "G" and by this reference incorporated herein is a true and correct copy of the Minutes of the meeting of the Labor Management Adjustment Board, held on July 26, 1972. I was present at the meeting, the minutes were prepared shortly after the meeting, and were approved by the Board and are an accurate summary of what took place at the meeting.

11. The Trusts incurred a reasonable cost for conducting and completing the audit of $200.00.

12. The Trusts have paid or agreed to pay their attorneys Wayne Jett, Lawyers, $1,802.50, for the prosecution of this action. The hourly rate charged the Trusts varied from $40.00 to $45.00, depending on the attorney performing the work.

I declare under penalty of perjury that the above is true and correct.

Executed on January 10, 1980, at Pasadena, California.

/s/ Leo A. Majich
Leo A. Majich

EXHIBIT "D".

SOUTHERN CALIFORNIA MASTER Labor Agreement

Between

THE INTERNATIONAL UNION OF OPERATING ENGINEERS

AND THE

SOUTHERN CALIFORNIA GENERAL CONTRACTORS ASSOCIATIONS

Except San Diego County

July 1, 1977 to June 15, 1980

ARTICLE II

* * *

D. Employees employed by one or more of the Contractors for a period of eight (8) days continuously or accumulatively under the work jurisdiction of a particular Union as that term is defined herein shall be or become on the eighth (8th) day or eight (8) days after the effective date of this Agreement, whichever is later, members of such Union and shall remain members of such Union as a condition of continued employment. Membership in such Union shall be available upon terms and qualifications not more burdensome than those applicable at such times to other applicants for membership to such Union.

E. The Contractor shall discharge any employee pursuant to the foregoing section upon written notice from the Union of such employee's non-payment of initiation fees or dues.

ARTICLE IV

* * *

D. The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

ITEM 6.

Declaration of Jim McNeff in Support of Defendant's Motion for Summary Judgment.

United States District Court, Central District of California.

Frank L. Todd, et al., Plaintiffs, vs. Jim McNeff, Inc. et al., Defendants. No. CV-79-1527-IH.

Date: February 4, 1980.

Time: 10:00 A.M.

Filed: January 2, 1980.

State of California, County of Orange — ss,

I, JIM MCNEFF, declare:

1. I make this declaration in support of defendants' motion for summary judgment in the above-captioned action.

2. I am the president of Jim McNeff Inc. ("McNeff") which is engaged in the construction and agricultural industries in Southern California with its principal place of business located in Mecca, California.

3. On September 13, 1978 I was approached by Jerry Lathaim, a business representative of Operating Engineers Local Union No. 12 ("Local 12"). Lathaim told me I had to join the union or leave the job. I refused to join. Lathaim left and returned with Dave Harmon, the superintendant for Keith Dewar Construction, the general contractor on the project. Harmon told me I had to sign with the union that day or leave the job. I then agreed to sign the contract. We went into Dewar's construction trailor and I signed some documents. Lathaim and I then went to my three employees, Milton Deacon, Mike Feliz, and Dennis Read and I told them they had to join the union or they could not work. All three of them signed union cards.

4. I did not read the Master Labor Agreement before I signed the contract nor have I ever read it. I did not pay the wage rates or benefits in the Master Labor Agreement ("Agreement") nor did I abide by the terms of that document.

5. At the end of September the Dewar job was complete and Felix quit. Reed and Deacon continued to work for McNeff on agricultural jobs. McNeff hired other employees as needed without complying with the requirements of the Agreement.

6. In March I was approached by a representative of the trust funds who wanted to audit McNeff's books. A disagreement arose and the trust funds sued McNeff in this lawsuit.

7. McNeff then filed a petition with the NLRB on May 22, 1979 seeking an election to determine whether its employees wanted to be union.

8. Local 12 then filed an unfair labor practice with the NLRB saying McNeff was in violation of the Agreement.

9. I gave evidence to my attorney who then presented the evidence to the NLRB in the investigation of the unfair labor practice charge.

10. On July 10, 1979 the NLRB issued a letter finding I was not bound to a contract with Local 12.

11. The NLRB then scheduled an election for my employees in August.

12. Shortly before the election Local 12 filed an appeal of the NLRB's decision so the election was postponed.

13. On November 8, 1979 the Division of Appeals rejected Local 12's appeal and found there was never a valid agreement.

14. The election is now scheduled for January 23, 1980.

DATED: January 19, 1980.

/s/ Jim McNeff

ITEM 7.
Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment With Exhibits A and B Thereof.

United States District Court, Central District of California.

Frank L. Todd, et al., etc., Plaintiffs vs. Jim McNeff, Inc., et al., Defendants. No. CV 79-1527-IH.

Date: February 4, 1980.

Time: 10:00 A.M.

Filed: January 21, 1980.

Defendants, Jim McNeff, Inc., et al., submit the following Points and Authorities in support of their motion for summary judgment against plaintiffs, Frank L. Todd, et al., as Trustees of the Operating Engineers Trusts.

I. INTRODUCTION

This is an action by the Trustees of four employee benefit trusts for fringe benefit contribution and damages required by an allegedly enforceable collective-bargaining agreement entered into by, Jim McNeff (hereinafter "McNeff"), and the International Union of Operating Engineers, Local NO. 12 (hereinafter "Local 12") on September 13, 1978.

The plaintiffs are the trustees of four joint labor management trusts established by collective bargaining agreements between Local 12 and various employer associations in Southern California. Jim McNeff, Inc., is a California Corporation, engaged in construction and agricultural work, which signed a short-term collective-bargaining agreement with Local 12 (hereinafter "Agreement"). The Agreement incorporated by reference the Master Labor Agreement between Local 12 and various employer associations of contractors in Southern California.

II. FACTS

McNeff is engaged in the construction and agricultural industries in Southern California with its principal place of business located in Mecca, California.

On September 13, 1978 Jim McNeff, the president of McNeff, was approached on a jobsite by Jerry Lathaim a business representative of Local 12. Lathaim informed Jim McNeff that McNeff had to join the union or leave the job. McNeff refused to sign a union contract. Lathaim then returned with the job superintendant who told McNeff that he had to sign with the union that day or leave the job. McNeff then signed the Agreement. McNeff and Lathaim then informed McNeff's employees that they had to join the union or they could not work.

McNeff did not read the Agreement before he signed it nor has he ever read it. McNeff did not pay its employees the wage rates and benefits set forth in the Agreement nor did McNeff follow the other terms of the Agreement.

After this lawsuit was filed McNeff filed a petition for an election with the National Labor Relations Board (hereinafter "NLRB") to determine which employees constituted an appropriate bargaining unit and whether the employees wished to be represented by Local 12. (a copy of that petition is attached as Exhibit A).

On June 4, 1979 Local 12 filed an unfair labor practice charge with the NLRB alleging that McNeff had repudiated and failed to comply with its agreement with Local 12 in violation of the National Labor Relations Act (hereinafter "NLRA"). (copy attached as Exhibit B).

The NLRB investigated Local 12's unfair labor practice charge and received evidence from McNeff. On July 10, 1979 the NLRB dismissed the charge finding that while the parties executed an agreement a full collective-bargaining

relationship was never established. The NLRB found that McNeff repudiated the contract from its inception and signed the contract as a surface gesture without the intent of entering into a collective-bargaining relationship. (copy of dismissal letter attached as Exhibit C).

The NLRB then scheduled an election for McNeff's employees in August, 1979. Before the election Local 12 appealed the NLRB's decision to the NLRB's Office of Appeals in Washington, D.C.

On November 8, 1979 the Office of Appeals denied the appeal finding the employer was forced to sign the agreement but repudiated it immediately and never implemented any of its terms. The Office of Appeals also noted that the union did not object to the repudiation until June, 1979. (a copy of the denial is attached as Exhibit D).

The NLRB election is now scheduled for January 23, 1980.

III. LEGAL ARGUMENT

1. *Absent a showing that Local 12 is the uncoerced collective bargaining representative of a stable majority of McNeff's employees the contract is unenforceable.*

It is respectfully submitted that the recent U.S. Supreme Court Case, *NLRB v. Local Union 103*, 434 U.S. 335, 98 S. Ct. 651 (1978) (*Higdon*) is controlling. In that case, the Supreme Court determined that a union violated section 8(b) (7) (C) of the NLRA [29 U.S.C. § 158(b) (7) (C)] by picketing to protest alleged violations of a "pre-hire contract entered into by Local 103 and Higdon pursuant to Section 8(f) of the NLRA [29 U.S.C. § 158 (f)]. The Court analyzed the Section 8(f) [29 U.S.C. § 158 (f)] construction industry exception to the Section 7 [29 U.S.C. § 157] guarantee that employees are able to "bargain collectively with representatives of their own choosing." Through the 8(f) exemption

the execution of voluntarily executed agreement with a non-majority Union, an act normally an unfair labor practice, is legitimatized. General Counsel's Memorandum 79-32, P 4-6 (copy attached as Exhibit E). As stated in *Higdon, supra* at P 345

> "The exemption is nevertheless of limited scope, for the usual rule protecting the union from inquiry into its majority status during the term of a collective-bargaining contract does not apply to pre-hire agreements"
>
> "The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites"

Herein, McNeff signed a section 8(f) agreement with Local 12. However, the enforceability of that contract turns on whether Local 12 ever represented an uncoerced majority of McNeff's employees in an appropriate collective bargaining unit. This is the identical issue decided by the regional attorney and the General Counsel of the NLRB in refusing to file a complaint against McNeff in response to Local 12 charges of a section 8(a)(1) [29 U.S.C. § 158 (a)(1)] and section 8(a)(5) [29 U.S.C. § 158(a)(5)] violation.

The charges filed with the NLRB by Local 12 alleged that McNeff was bound to the Agreement and was in violation of that Agreement. McNeff was in violation of the Agreement as noted in both Exhibits B and C since McNeff repudiated the contract from its inception and never paid the wage rates and trust fund benefits required by the Agreement. However, the NLRB found McNeff was not in violation of the Act because the agreement was never valid inasmuch as McNeff's employees did not freely designate Local 12 as their representative. The NLRB also noted that McNeff's execution of the Agreement was not voluntary.

McNeff was coerced into signing an Agreement with Local 12. McNeff then required its employees to join Local 12 but never applied the terms and conditions of that Agreement and McNeff's employees soon dropped their Local 12 membership. Thus, as found by the NLRB, this Agreement is not enforceable since Local 12 has never established itself as the uncoerced majority representative of McNeff's employees.

2. *The court should defer to the NLRB's decision on the basis of primary jurisdiction.*

In San Diego Building Trades Council v. Garmon 359 U.S. 236, 242-243, 79 S. Ct. 773, 3. L. Ed. 2d 775 the Court provided what has come to be accepted as the general guideline for determining the extent to which the NLRB's primary jurisdiction preempts State and Federal Courts from deciding questions of national labor policy. The Court held in Garmon that when an activity is arguably subject to §7 or 8 of the [NLRA] the States as well as the Federal Courts must defer to the exclusive competence of the NLRB (359 U.S.C. 245, 79 S.Ct. at 779-780) at 1233. "This has remained the basis for determining the extent to which State and Federal Courts must defer to the primary jurisdiction of the NLRB." *Sears Roebuck & Co., v. Carpenters*, (1978) 436 U.S.C. 180. 191-199, 98 S.Ct. 1745, 56 L. Ed. 2d 209.

Local 12 filed unfair labor practices with the NLRB alleging that a valid collective bargaining agreement existed and McNeff was in violation of the agreement. The NLRB found that there was no violation of the Act since there was never an enforceable collective bargaining agreement.

The ligation herein involves the same issues, (1) is the Agreement valid and (2) if so is McNeff in violation of the

Agreement, considered by the NLRB. Therefore, under Garmon, the court is compelled to defer to the NLRB's decision.

In accord are two recent decisions, *South Prairie Construction Company v. Local NO. 627*, 425 U.S. C. 800, 96 S. Ct. 1842 (1976) and *Waggoner v. R. McGray, Inc.*, 607 F. 2d 1229 (9th Cir. 1979).

In *South Prairie* the Circuit Court of Appeals for the District of Columbia found that the union was the majority representative of *South Prairie's* employees. The Court reversed noting that the circuit court's action was "incompatable with the orderly function of the process of judicial review." *NLRB v. Metropolitan Ins. Co.* 380 U.S. 438, 444, 85 S. Ct. 1061, 1064, 13 L.Ed.2d 951, 955 (1965). The Court stated that the selection of an appropriate bargaining unit was largely within the discretion of the Board, whose decision, "if not final is rarely to be disturbed" *Packard Motor Co. v. NLRB* 390 U.S. 485, 491. 67 S.Ct. 789, 793, 91 L.Ed 2d 1040, 1050 (1947).

The issue presented herein is similar to that considered in *South Prairie*, whether Local 12 was freely designated by McNeff's employees in an appropriate collective bargaining unit. It is respectfully submitted that the court is required to defer to the NLRB's expertise in this area. To hold otherwise could only result in chaos. For example, the NLRB scheduled an election for McNeff's employees on January 23, 1980 to determine whether the employees wish to be represented by Local 12. Yet herein, plaintiffs ask the court to determine that the employees are already represented by Local 12.

In *Waggoner* the Ninth Circuit held that unfair labor practice issues fell within the primary jurisdiction of the NLRB while issues dealing with the terms of the collective bargaining agreement are exempted from the primary jurisdic-

tion principal at 1234-1235 citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971). Herein the court is faced with two issues, (1) is the contract valid and (2) if so is McNeff in violation of the contract.

The issue of whether this is a valid contract is not governed by the terms of the collective bargaining agreement and is within the primary jurisdiction of the NLRB. Thus, this court is without authority to determine if Local 12 was ever the duly authorized representative of McNeff's employees for purposes of collective bargaining.

IV. CONCLUSION

Based on the foregoing it is respectfully submitted that the complaint should be dismissed in its entirety and defendants awarded their costs and attorney's fees.

DATED: January 19, 1980.

Respectfully submitted,
STEVEN D. ATKINSON
By: Steven D. Atkinson
Steven D. Atkinson
Counsel for Defendant

EXHIBIT A.

United States of America, National Labor Relations Board.

PETITION

Case No: 21-RM-1967

Date Filed: 5-22-79

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

Purpose of this Petition (*If box RC, RM or RD is checked and a charge under Section 8(b)(2) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made*):

RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

NAME OF EMPLOYER: JIM MC NEFF, INC.

EMPLOYER REPRESENTATIVE TO CONTACT: Jim McNeff

ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (*Street and number, city, State, and ZIP Code*):

92-241 National Avenue, Mecca, California 92254

TYPE OF ESTABLISHMENT (*Factory, mine, wholesaler, etc.*): Engineering Subcontractor

Unit Involved (*In UC petition, describe PRESENT bargaining unit and attach description of proposed classification*):

All regular and part-time employees performing work covered by the Operating Engineers Agreement

All other employees including guards and supervisors as defined in the Act.

NUMBER OF EMPLOYEES IN UNIT:
PRESENT: 2

Request for recognition as Bargaining Representative was made on September 15, 1978.

NAME: THE INTERNATIONAL UNION OF OPERATING ENGINEERS

ADDRESS: 3055 Wilshire Boulevard, Los Angeles, CA 90010

DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (*Show month, day, and year*): June 15, 1980

IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYERS ESTABLISHMENT(S) INVOLVED: NO XX

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

JIM MC NEFF, INC.
(Steven D. Atkinson)
/s/ Steven D. Atkinson, Attorney

Address 1300 Dove Street, Second Floor, Newport Beach, CA 92660 (714) 752-1165.

EXHIBIT B.

United States of America, National Labor Relations Board.

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-17870

Date Filed: 6-4-79

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Jim McNeff, Inc.; Jim McNeff Trucking and Equipment Rental, joint employer

b. Number of Workers Employed

c. Address of Establishment (Street and number, city, State, and ZIP code): 92-241 National Avenue Mecca, California 92254.

d. Employer Representative to Contact: Steven D. Atkinson.

e. Phone No.: (714) 752-1165

f. Type of Establishment (Factory, mine, wholesaler, etc.): Engineering Subcontractor

g. Identify Principal Product or Service:

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):

The Employer has repudiated, and has failed to comply with its agreement with the Union.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number): Local No. 12, International Union of Operating Engineers.

4a. Address (Street and number, city, State, and ZIP code): 3055 Wilshire Boulevard, Third Floor, Los Angeles, California 90010.

4b. Telephone No.: 380-4120

5. Full Name of National or International Labor Organization of Which it is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization): International Union of Operating Engineers, AFL-CIO

C. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

REICH, ADELL, CROST & PERRY, PLC, Attorney

By /s/ Julius Reich
Julius Reich

Address: 501 Shatto Place, Suite 100, Los Angeles, CA 90020, 386-3860

June 1, 1979.

ITEM 8.
Dismissal of Unfair Labor Practice Charge by Regional Director of Board.

(By Reference to Petition for Writ of Certiorari.)

(Text of NLRB Dismissal Letter appears at Appendix D of Petition for Writ of Certiorari.)

ITEM 9.
Denial of Appeal of Refusal by Regional Director to Issue Complaint.

(By Reference to Petition for Writ of Certiorari.)

(Text of NLRB Denial of Appeal Letter appears at Appendix E of Petition for Writ of Certiorari.)

ITEM 10.
Summary Judgment.

(By Reference to Petition for Writ of Certiorari.)

(Text of Summary Judgment appears at Appendix B of Petition for Writ of Certiorari.)

ITEM 11.
Reporter's Transcript of Proceedings.

(By Reference to Petition for Writ of Certiorari.)

(Text of Reporter's Transcript of Proceedings appears at Appendix C of Petition for Writ of Certiorari.)

ITEM 12.
Opinion of United States Court of Appeals for the Ninth Circuit.

(By Reference to Petition for Writ of Certiorari.)

(Text of Opinion of United States Court of Appeals for the Ninth Circuit appears at Appendix A of Petition for Writ of Certiorari.)

ITEM 13.
Notice of United States Supreme Court Order Granting Petition for Writ of Certiorari.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

July 2, 1982

James T. Winkler, Esq.
Atkinson, Andelson, et al.
911 Studebaker Road, Suite 250
Long Beach, California 90815

RE: Jim McNeff, Inc. v. Frank L. Todd, et al., No. 81-2150

Dear Mr. Winkler:

The Court today entered the following order in the above case:

> "The petition for a writ of certiorari is granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States."

Enclosed are memorandums describing the time requirements and procedures under the rules.

I have been instructed to inform you that Rule 34(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not have printed on this page the title of the case or any other descriptive matter. A sample sheet is enclosed.

The additional docketing fee of $100, Rule 45(a), is due and payable.

Very truly yours,
ALEXANDER L. STEVAS, Clerk
By /s/ June M. Hoffman
(Miss) June M. Hoffman
Assistant Clerk

Enclosures